IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 60408-2-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
ANTHONY WYNN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 10, 2009
	)	

Ellington, J. — During Anthony Wynn's trial for second degree rape, the prosecutor repeatedly asked the arresting detective on direct examination whether Wynn expressed surprise or proclaimed his innocence after being read his rights. The State concedes, and we agree, that these questions violated Wynn's rights to remain silent and to due process. Because the questions were not harmless beyond a reasonable doubt, we reverse and remand for a new trial.

FACTS

April Lewis testified that on the evening of April 6, 2005, she visited Wynn at his home. They drank wine and sat together on a couch in the living room. At some point, Wynn left the room and came back with a knife. He told Lewis she was either going to have to kill him or have sex with him. She refused to do either, took the knife out of his hand, and threw it toward the kitchen. Wynn then told her, "Now you're in trouble."[1]

Wynn proceeded to forcibly remove Lewis's clothes. He choked her, grabbed her hair, and forced her to have vaginal intercourse. When Lewis started putting on her underwear, Wynn pulled it off, picked her up, and carried her into the bedroom. He then forced her to have anal sex. Afterward, Wynn told Lewis not to move and left the room. He came back with the knife in his hand. He said repeatedly that she was either going to kill him or he was going to rape her again. When she told him he was going to have to let her go or kill her, he pointed the knife at his chest and told her she could leave. Lewis left and immediately called the police.

A short time later, Lewis went to a hospital for an examination. The attending nurse described her as upset and tearful. A vaginal examination disclosed a tear in her posterior fourchette. Anal and vaginal swabs contained a protein found in semen.

Lewis's friend Lisa Smith testified that when she picked her up from the hospital, Lewis still appeared very upset. She had pain in her neck, back, and pelvic area, and walked gingerly with small steps.

Detective Kyle Spevacek of the Burlington Police Department testified that he arrested Wynn the next morning outside his residence. He told Wynn he needed to talk to him about an incident at his residence and advised him of his rights. The prosecutor then asked the following series of questions:

> Q. Was his first reaction: What are you talking about?
>
> A. No.
>
> Q. Was his first reaction: Nothing happened?
>
> A. No. When we came and took him into custody, he was very somber. He lowered his head. As I talked to him, he started to tear up. He was very—he was upset.

[1] Report of Proceedings (RP) (June 5, 2007) at 34.

> Q. But did he indicate he had no idea what you were talking about?
>
> A. No, not to me.[2]

Defense counsel requested a sidebar and moved for a mistrial on the ground that the questions commented on Wynn's right to remain silent. The court denied the motion "at this point in time," but invited further briefing.[3]

Resuming his testimony, Detective Spevacek testified that Wynn gave a statement 10 minutes after his arrest. Wynn sobbed and would not make eye contact. He told the detective that after he and Lewis had consensual sex in the bedroom, he displayed a knife because he wanted to make her angry enough to kill him. He initially denied having anal sex with Lewis. But when the detective told him that Lewis was being examined at a hospital, Wynn said he "may have tried."[4] Wynn admitted choking Lewis, but said "he did not choke her hard" and did so only to make her angry enough to kill him.[5] He said he "just flipped out" and was sorry "for everything I've put her through."[6] He did not mention oral sex during his statement.

On the next day of trial, defense counsel renewed his mistrial motion. He argued that the comments on Wynn's silence were not harmless beyond a reasonable doubt and noted that "now the defendant has to deal with this in making his decision as to whether or not he is going to testify in the first place. I think it's highly prejudicial

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[2] Id. at 154.

[3] Id. at 160.

[4] Id. at 173.

[5] Id. at 174.

[6] Id. at 176.

error, and a mistrial should be declared at this point."[7] The court agreed that the prosecutor commented on Wynn's silence and that the comments were constitutional error. The court concluded, however, that the error was harmless, stating:

> But in light of the fact that he gave statements that he felt sorry for what he put Ms. Lewis through, the knife was introduced into this situation; that he flipped out; that he was upset, wanting to make her angry, all of those things, I don't think his reaction at the time of the arrest is such that it requires a mistrial.[8]

The court added that "[w]e won't have the entire record until the trial is completed, but in light of all circumstances that I am aware of . . . my ruling will stand."[9]

The defense then put on its case. Two witnesses testified to Wynn's reputation for being law abiding and peaceful. Defense investigator Kendra Halcomb testified that during a defense interview, Lewis claimed Wynn choked her by putting his hands around her neck and placing his thumbs on her trachea.

Dr. John Butt testified that given Lewis's description of the choking, he "would expect her neck to show some form of bruising" for up to 18 days.[10] Abrasions on her neck were also possible, as were defensive injuries on her hands. Dr. Butt expected that an anal rape would result in visible injuries to the anus, and that a tear to the posterior fourchette would cause bleeding. On cross-examination, he admitted that his expectations regarding choking injuries would depend on the amount of force used and the duration of the choking event. He also admitted that a greater proportion of women

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[7] RP (June 6, 2007) at 5–6.

[8] Id. at 11.

[9] Id. at 13.

[10] Id. at 26.

suffer genital injury during forced sex than during consensual sex. On redirect, he stated that a vaginal tear can be consistent with rough sex. He also stated that a person being choked would instinctively fight for his or her life.

Wynn testified and claimed that Lewis voluntarily performed oral sex on him on the couch. She also consented to vaginal intercourse. Wynn asked her to engage in anal sex but she refused and seemed upset that he had asked. At that point, Wynn "felt like [he] wanted to die."[11] He retrieved a knife from the kitchen and asked Lewis to kill him. When she said no, he again asked her to have anal sex. She refused and Wynn again asked her to kill him.

Eventually, they had consensual sex in the bedroom. Lewis continued to refuse Wynn's requests for anal sex. When Wynn tried to turn her over, she yelled, "So what, are you going to rape me now?"[12] Wynn then placed his hand below her neck, pushed her down, and told her not to yell at him. He then retrieved the knife and again asked Lewis to kill him. Wynn told her she could go, but asked if she was going to call the police. She said no, but said she did not want to see him again.

The court instructed the jury on first degree rape and the lesser offense of second degree rape. After initially indicating they were deadlocked, the jury ultimately found Wynn not guilty of first degree rape, but guilty of second degree rape.

DECISION

When a defendant is silent following Miranda[13] warnings, due process precludes

[11] Id. at 84.

[12] Id. at 90.

[13] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the State from "[c]alling attention to that silence [at trial], and suggesting thereby that an unfavorable inference might be drawn."[14] This is because silence in the wake of Miranda warnings is "insolubly ambiguous" and may merely reflect reliance on the right to remain silent rather than a fabricated defense.[15] Further, Miranda warnings impliedly assure that silence will not be used against a defendant at trial.[16] Telling the jury that the defendant remained silent following Miranda rights violates due process by undermining this implicit assurance.[17] In this case, Wynn contends, and the State concedes, that the prosecutor improperly commented on his post-arrest silence during his direct examination of Detective Spevacek. We agree.

After establishing that Detective Spevacek advised Wynn of his Miranda rights, the prosecutor asked whether Wynn's reaction was "What are you talking about?" or "Nothing happened" or "[I have] no idea what you [are] talking about." These questions called attention to Wynn's silence after Miranda warnings and suggested that his silence evidenced guilt. This impermissibly commented on his right to remain silent and violated due process.[18]

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[14] State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979); State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (State may not use silence "either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."); State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002) ("Either eliciting testimony or commenting in closing argument about the arrestee's exercise of his Miranda rights circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself.").

[15] Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[16] Id. at 618.

[17] Id. at 619; State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

[18] See State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004) (testimony that defendant, who eventually gave a statement, did not act surprised or deny allegations at the time of his arrest was comment on silence).

Wynn contends a similar error occurred during the following portion of the prosecutor's opening statement:

> [Detective Spevacek] comes out at 9:30 that morning, four hours after all of this. Goes over to Mr. Wynn's home, waiting for him to leave the house. Tells him he's under arrest. He talks to Detective Spevacek a little bit. We'll hear about that. Curiously, the first thing he says to Detective Spevacek is *not what's this all about, not what are you talking about?* But it's more along the lines of I'm really sorry.[19]

Although the State attempts to distinguish these remarks from the improper questioning of the detective, the prosecutor conceded below that they were "the exact same thing."[20] We agree with Wynn that the opening remarks were another attempt to call attention to his silence.

The State argues, however, that any comments on Wynn's silence were harmless beyond a reasonable doubt.[21] The State acknowledges that "a showing of harmlessness usually requires the State to demonstrate that the evidence was so overwhelming that it necessarily leads to a finding of guilt."[22] It asserts, however, that the overwhelming untainted evidence test is not germane to our review because the trial court addressed the error in its mistrial ruling and we review that ruling for abuse of discretion.[23] We reject this assertion for several reasons.

First, whether an error is harmless is normally a question of law that we review

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[19] RP (June 5, 2007) at 9 (emphasis added).

[20] Contrary to Wynn's assertions, nothing in the prosecutor's closing argument even remotely touched on his silence.

[21] State v. Evans, 96 Wn.2d 1, 6, 633 P.2d 83 (1981).

[22] Br. of Resp't at 19; see State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997).

[23] State v. Johnson, 147 Wn. App. 276, 289, 194 P.3d 1009 (2008), review denied, 165 Wn.2d 1050 (2009).

de novo.[24] Second, the trial court implicitly applied the overwhelming evidence test when, in the exercise of its discretion, it found the error harmless and denied a mistrial. Our review of that ruling necessarily involves application of the overwhelming evidence test. Finally, as the trial court acknowledged, the mistrial/harmless error ruling was made before the State finished its case or the defense even called its first witness. Because that ruling was made on an incomplete record, it is not entitled to the deference typically given to such discretionary rulings. Accordingly, we apply the overwhelming evidence test to the errors in this case.

A constitutional error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.[25] Although the State's case against Wynn was strong, it was not overwhelming. The central issue was whether the sexual intercourse was accomplished by forcible compulsion or consent. That issue turned on the credibility of the defendant and the victim. Wynn's credibility was directly at issue because he testified on his own behalf on disputed matters. Although there were certainly weaknesses in his testimony, his story was not implausible. That conclusion is supported by the fact that the jury initially indicated it was "done deliberating and [could not] come to any verdict."[26] In these circumstances, and in light of the "highly prejudicial" nature of comments on silence, we conclude the errors were not harmless beyond a reasonable doubt.[27] The State's arguments to the contrary are not

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[24] State v. Bird, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

[25] Keene, 86 Wn. App. at 594.

[26] Clerk's Papers at 124.

[27] See Fricks, 91 Wn.2d at 395–97 (reversible error for prosecutor to elicit "highly prejudicial" testimony that he made no statement when arrested and to highlight

persuasive.

The State argues that "[t]he jury could not have inferred that the defendant's failure to talk to police indicated his guilt—because there was no such failure."[28] The State cites no authority for this proposition. Nor does the proposition have any logical force. Whether a suspect remains silent or ultimately chooses to speak to police, calling attention to his initial silence carries the same impermissible implication, i.e., that the suspect was silent because he was guilty.[29] And when the suspect makes a statement after initially being silent, calling attention to his initial silence also implies, and allows a jury to infer, that his subsequent statement was fabricated.[30] It is simply improper to comment on any period of silence, regardless of whether the defendant subsequently waives his rights and speaks to police.[31]

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that fact in closing argument); Holmes, 122 Wn. App. at 446 (testimony and brief argument commenting on defendant's failure to express surprise or innocence at arrest were not harmless); Curtis, 110 Wn. App. at 13–16 (where prosecutor asked whether the defendant said anything in response to receiving his Miranda warnings and witness said the defendant refused to speak and asked for a lawyer, error was not harmless even though prosecutor did not revisit the issue).

[28] Br. of Resp't at 20.

[29] See United States v. Hernandez, 948 F.2d 316, 323–24 (7th Cir.1991) (rejecting argument "that there was no implication of guilt in the evidence of . . . momentary silence because . . . the jury was made aware that [the defendant] did make some statements after being read his Miranda rights").

[30] Cf. Curtis, 110 Wn. App. at 12–16 (noting that comment on silence allows jury to infer both that the defendant was guilty and that his defense was fabricated).

[31] See, e.g., State v. McSorley, 128 Wn. App. 598, 615–17, 116 P.3d 431 (2005) (where defendant was silent for a few questions and then spoke to police, comments on his initial silence were improper); Fricks, 91 Wn.2d at 395–96 (where defendant was silent after arrest but later signed a written confession, it was reversible error to elicit testimony that he made no statement when arrested and to highlight that fact in closing); State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988) (comment on silence occurred where the "prosecutor focused not on any prior inconsistent statements made by the defendant, but on his failure to make a statement immediately

The State also argues that any adverse inferences from Wynn's silence were dispelled when he testified that he thought the police were arresting him because he displayed a knife and asked Lewis to kill him. But it was the State's violation of Wynn's rights that forced him to make that explanation. In fact, defense counsel pointed out during the mistrial motions that the improper comments had put Wynn in the position of having to testify to explain his silence. If anything, Wynn's testimony explaining his post-arrest reaction highlights the prejudice created by the error.[32]

Next, the State contends the error was harmless because it was limited to three questions asked during Detective Spevacek's direct examination. As noted above, however, the prosecutor's opening statement contained similar references to Wynn's post-arrest silence. In any event, the three questions were sufficient by themselves to create reversible error. The prosecutor repeatedly and pointedly asked whether Wynn had expressed any surprise or declared his innocence at the time of his arrest. These repeated references "had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration."[33] Whether the prosecutor commented further is immaterial.[34]

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upon arrest. Although the prosecutor commented on Belgarde's prior inconsistent statement in other portions of closing argument, the challenged remarks specifically refer to the officers present when Belgarde was first apprehended.").

[32] See Curtis, 110 Wn. App. at 12–16 ("And, of course, injecting evidence of post-arrest silence may also impermissibly pressure the defendant to testify and explain that silence. This is a further erosion of his right to remain silent.").

[33] State v. Burke, 163 Wn.2d 204, 222–23, 181 P.3d 1 (2008).

[34] Curtis, 110 Wn. App. at 13–16 (where prosecutor asked whether the defendant said anything in response to receiving his Miranda warnings and witness said the defendant refused to speak and asked for a lawyer, error was not harmless even though prosecutor did not revisit or harp on the issue).

We also reject the State's assertion that Wynn's refusal of a curative instruction "indicates his recognition that the jurors were unlikely to draw adverse [inferences] unless the issue was emphasized for them."[35] It is just as likely that counsel believed the jury was going to draw an adverse inference and simply did not want to make a bad situation worse. In that regard, Washington courts have recognized that eliciting comments on silence puts the defense "in a difficult position. 'Counsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone.'"[36] Courts have also expressed doubt about the effectiveness of curative instructions in the context of comments on silence.[37] Counsel's decision to refuse a curative instruction thus sheds no light on the harmfulness of the error.

Finally, the State contends State v. Pottorff[38] supports a conclusion that the error in this case was harmless. Pottorff is easily distinguished. In that case, a police officer testified that after he advised Pottorff of his rights, Pottorff "freely talked" and said he "'slapped [the victim] around a little.'"[39] The officer then testified that when he asked Pottorff if he struck the victim with his cane, Pottorff "didn't reply. He said at that time he wanted to invoke his right to remain silent, so we took the cane from him and placed

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[35] Br. of Resp't at 21.

[36] Holmes, 122 Wn. App at 446 (quoting Curtis, 110 Wn. App. at 15).

[37] See, e.g., United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir.1978) (by itself, even a prompt and forceful instruction is insufficient to vitiate the use of post-arrest silence).

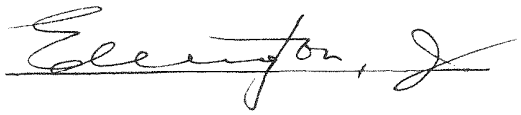
[38] 138 Wn. App. 343, 156 P.3d 955 (2007).

[39] Id. at 345.

him under arrest for assault."[40] In concluding that this testimony was harmless, the Pottorff court noted that it (1) was nonresponsive and not exploited by the State, (2) did not immediately follow the officer's testimony concerning Miranda warnings, (3) was cumulative of other testimony; (4) did not necessarily give rise to an inference of guilt because Pottorff's defense was self-defense and he freely admitted using the cane for that purpose, and (5) was not entirely improper since Pottorff freely spoke to the officers up to that point and therefore the State was entitled to comment on what he did not say.

None of those factors are present here. While the State is correct in noting that the prosecutors in Pottorff and the present case did not exploit the improper comments in their closing arguments, it overlooks the fact that, unlike the Pottorff prosecutor, the prosecutor in this case made similar comments in his opening statement and purposefully and repeatedly elicited the improper statements from the witness.

In conclusion, the State has not carried its burden of showing that the errors were harmless beyond a reasonable doubt, and the trial court abused its discretion in concluding otherwise. We therefore reverse the conviction and remand for a new trial. Given this disposition, we need not reach the other issues raised on appeal.



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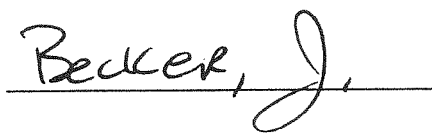

[40] Id. at 346.

Cox, J.